Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-355

NORMAN J. BERNSTEIN, Husband,

Petitioner,

vs.

STATE OF FLORIDA, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE SECOND CIRCUIT

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A.

QUESTIONS PRESENTED

Respondents, STATE OF FLORIDA and RAYMOND E. RHODES, Clerk and individually, disagree with Petitioner's statement of the questions presented, and submit that the following questions are presented:

1. Whether the State of Florida is a "person" in a civil rights suit brought

pursuant to 42 U.S.C. Section 1983, and whether this suit is barred by the Eleventh Amendment.

2. Whether the Clerk of a Florida District Court of Appeal, acting within the scope of his official duties, is protected from a civil rights suit by virtue of the doctrine of judicial immunity.

3. Where the action arose in the State of Florida and all individual defendants reside in Florida, do venue and personal service requirements permit filing and prosecution of a civil suit in the United States District Court for the District of Vermont.

B.

STATEMENT OF THE CASE

This is a suit by Norman J. Bernstein, petitioner, who claims that a judgment of divorce in a Florida proceeding violated his rights protected by the First and Fourteenth Amendments to the United States Constitution. At the time of his Complaint Petitioner was a citizen of Vermont. All Respondents, except the State of Florida, are citizens of said state, and all Respondents were served by summons within the territorial jurisdiction of the State of Florida.

Petitioner Bernstein, through his Complaint, seeks a judgment declaring the divorce laws of Florida to be unconstitutional, and his divorce obtained in that

state to be null and void. Further, Petitioner seeks money damages against the State of Florida, Clerk of Court and the two respondent attorneys. Additionally, Petitioner seeks a judgment encouraging reconciliation of the former spouse "to restore the parties to their lawful and godly position as husband and wife."

C.

ARGUMENT

Petitioner Bernstein has offered this Court no cogent legal arguments for the Court to review the decision of the Second Circuit Court of Appeal in the case. Furthermore, it is manifest from a review of Petitioner's Petition for Writ of Certiorari that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument, the Petitioner having failed to disclose to this Court any sound ground why the cause should be reviewed.

It should first be noted that this Court has disclaimed altogether any jurisdiction in the courts of the United States upon the subject of divorce. Justice Fields observed in Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565 (1877):

> The State, for example, has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created

> and the causes for which it may be dissolved. 95 U.S. at 734-5.

See also Sosna v. Iowa, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975).

The State of Florida is not subject to suit pursuant to 42 U.S.C. Section 1983 because states are not "persons" within the meaning of said section. Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). Additionally, it is well settled that the Eleventh Amendment to the United States Constitution precludes suits by citizens of claims for damages against unconsenting states. Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); Parden v. Terminal Ry. of Alabama States Docks Dept., 377 U.S. 184, 84 S.Ct. 1903, 12 L.Ed.2d 233 (1964). Petitioner's request for injunctive relief against the State of Florida is barred since no executive officer is named as a party. Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

Petitioner's claim for damages against Respondent Rhodes, as Clerk of the Florida District Court of Appeal, for rudeness must also fail. The claim is against the Respondent for acts done within the realm of his official duties as Clerk and are clothed with judicial immunity to the extent of damage actions. Davis v. McAteer, 431 F.2d 81 (8th Cir. 1970).

Finally, Petitioner brought his Complaint in the United States District

Court of Vermont, whereas all Respondents-Defendants were citizens of and domiciled in the State of Florida. None of the Respondents were within the reach of the State of Vermont's long arm statute, the Respondents' activities having no nexus with that state and the Petitioner having failed to allege said nexus. Hanson v. Denckla, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958).

It is readily apparent from the Petition for Writ of Certiorari previously filed that Petitioner has not even attempted to demonstrate to this Court sound legal argument concerning the jurisdictional hurdles to bringing the Complaint now at issue. Petitioner's argument can be restated that he is personally, socially and religiously opposed to divorce, with numerous citations to the Holy Bible. It is well settled that the federal judiciary should abstain from such policy arguments.

CONCLUSION

Therefore, Respondents, State of Florida and Raymond E. Rhodes, respectfully submit that the questions upon which this cause depend are so unsubstantial as not to need further argument. Respondents move this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Respondents' Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeal for the Second Circuit was forwarded, by U. S. Mail, to NORMAN J. BERNSTEIN, ESQUIRE, Thompsonburg, Londonderry, Vermont 05148, on this 27 day of September, 1977.

William C Sherrill Jr
WILLIAM C. SHERRILL, JR.